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In the Supreme Court of the United States

OCTOBER TERM, 1973

TOM S. ACUNA, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. The issue presented is whether the Court of Claims erred in holding that 5 U.S.C. 6101(a)(3) gave the Immigration and Naturalization Service discretion to schedule the basic work week of immigration inspectors to fall between Monday and Saturday. Petitioners, immigration inspectors of the Immigration and Naturalization Service, U.S. Department of Justice, brought suit in the Court of Claims to recover compensation which they claim is due them for the time they work in excess of 40 hours a week. Petitioners are regularly scheduled to work six days a week. Their annual salary is based upon a normal 40 hour week, 8 hours a day, 5 days a week. In addition, immigration inspectors are regularly scheduled to work for 8 hours on Sundays. Thus, *in toto*, immigration inspectors work a 48 hour week; 8 hours a day, six days a week with one of those days always falling on Sunday.

Petitioners are paid their regular salary for the basic 40 hour week they work, and overtime for the 8 hours they are scheduled to work in excess of 40 hours. Current regulations[1] provide that the basic workweek falls between Monday and Saturday. The Act of March 2, 1931, as amended, 8 U.S.C. 1353a, establishes overtime, Sunday, and holiday pay specifically for immigration personnel at the rate of two days' pay for Sunday and holiday work. Consequently, petitioners, as presently paid, receive their basic salary for 40 hours' work performed between Monday and Saturday, and two days' pay for the extra eight hours worked on Sunday. This amounts to 7 days' pay for 6 days' work. For their extra work day petitioners receive no overtime pay under the Federal Employees Pay Act of 1945, as amended, 5 U.S.C. 5542, because of the anti-pyramiding provision of that Act, 5 U.S.C. 5549, which precludes such overtime pay where employees receive overtime compensation under other statutory provisions.

Petitioners claim, however, that they should be receiving eight and one-half days' pay for six days' work. They contend that the agency abused its discretion in scheduling the basic workweek to begin on Monday, when the administrative workweek begins on Sunday. Petitioners claim that their basic workweek should begin on Sunday, entitling them to their basic salary for the first 40 hours worked (5 days' pay) plus two days' extra pay for Sunday, plus overtime for the final 8 hours worked (1½ days' pay), totalling 8½ days' pay for six days' work.

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[1]Immigration and Naturalization Service Administrative Manual 2818.04, section 1c, dated May 15, 1962.

2. The Court of Claims rejected petitioners' claims. It held that the agency had not abused its discretion in scheduling the basic workweek to begin on Monday, even though the administrative workweek of the agency begins on Sunday. The head of an Executive agency has discretion to consider both cost and the ability of the agency to function in scheduling the basic workweek, 5 U.S.C. 6101(a)(3), and the court found that in scheduling the basic workweek to exclude Sunday, consideration had been given to cost and the ability of the Service to function effectively. Moreover, according to the court, nothing in the applicable statutes or regulations requires that the start of the basic workweek coincide with the start of the administrative workweek. The court found that the agency's interpretation of the applicable statutes and regulations was reasonable and entitled to great weight.

3. The judgment of the Court of Claims is correct and no issue warranting further review is presented.

The Federal Employees Pay Act of 1945, as amended, 5 U.S.C. 6101(a)(3) provides:

> Except when the head of an Executive agency * * * determines that his organization would be severely handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee in his organization, that
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> * * * * *
>
> (B) the basic 40-hour workweek is scheduled on 5 days, Monday through Friday when possible, and the 2 days outside the basic workweek are consecutive;
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> * * * * *

This section clearly provides that the cost to the agency and the agency's ability to function may be considered in establishing the basic workweek. The court below expressly found that the departure from normal scheduling was based on these two considerations. Petitioners do not challenge the justification for the exception; rather, they dispute its application in this case.

Petitioners' argument reduces itself to the proposition that the Immigration and Naturalization Service has abused its discretion by failing to schedule the basic workweek so as to maximize the petitioners' compensation. The lack of merit in their argument is clearly demonstrated by 5 U.S.C. 5549, the anti-pyramiding provision of the Federal Employees Pay Act of 1945. Congress obviously intended, by enacting Section 5549, to preserve preferential overtime benefits previously established for designated classes of employees, such as immigration inspectors, while preventing them from collecting under two different statutes for the same services.

The Service's scheduling program properly implements the statutes and the intent of Congress to avoid double compensation for services rendered. When the agency's long-standing interpretation of the applicable statutes and regulations is reasonable and in harmony with the statutes, it is entitled to great deference. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367; *Udall* v. *Tallman*, 380 U.S. 1.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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